



EMPLOYMENT TRIBUNALS

Claimant: Mr A Backer

Respondents: Magdalene Limited
Sharon Smith
Wendi Cochrane
Steve Harlowe

Heard at: Remotely by CVP **On:** 1 November 2022

Before: Employment Judge Harrington

Appearances

For the Claimant: In person
For the Respondent: Ms A Greenley, Counsel

REASONS FOR THE JUDGMENT GIVEN ON 1 NOVEMBER 2022

- 1 This case comes before me today as a Preliminary Hearing to determine the question of disability and to finalise the List of Issues to be determined by the Tribunal at the full merits hearing listed in this case next year.

Disability

- 2 I am required to consider whether the Claimant was a disabled person pursuant to section 6 of the Equality Act 2010 ('EQA') at all relevant times because of the conditions of autism and / or back pain. The Respondent does not accept that the Claimant is so disabled.
- 3 During the hearing today the Claimant has represented himself and been supported by his partner. Whilst there were some technical issues, the Claimant was able to join the remote hearing successfully. Additional breaks were offered to the Claimant throughout the hearing and the Claimant was also invited to suggest any further adjustments

that could be made. At all times, the Claimant confirmed that he was content to proceed with the hearing and that he did not require any further adjustments.

4 Ms Greenley of Counsel represented the Respondent.

5 I have been referred to an agreed bundle and a skeleton argument from Ms Greenley. The Claimant gave evidence and both parties made closing submissions.

Legal Summary

6 Pursuant to Section 6(1) of the Equality Act 2010, a person has a disability if he has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

7 I have also been referred to The Equality Act 2010: Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (“the Guidance”); and the Equality Act 2010 Code of Practice (“the Code”).

8 It is for a claimant to show to the Tribunal that he meets the criteria of being a disabled person.

9 In assessing whether the disability has a substantial effect, the focus of the tribunal should be on what the Claimant cannot do, not on what they can do (Aderemi v London and South Eastern Railway Ltd [2013] ICR 591). Where some level of impairment is established, the question for the tribunal is whether the adverse effects of the impairments were “substantial” (Equality Act 2010 section 6(1)), where “substantial” means more than minor or trivial (section 212(1)). In Aderemi, Langstaff P provided the following summary,

“It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is

therefore little room for any form of sliding scale between one and the other'." (paragraph 14, p 591)

- 10 In answering the question of whether the effects are, at a certain point in time "likely to last a year or more", the tribunal must interpret "likely" as meaning "it could well happen" SCA Packaging Limited v Boyle [2009] ICR 1056.
- 11 The simple fact that a claimant can only carry out normal day-to-day activities with difficulty or with pain does not establish that disability is made out. As pointed out in Condappa v Newham Healthcare Trust [2001] All ER (D) 38 (Dec), the Act is concerned not with any adverse effect but rather with a substantial adverse effect. Whether or not pain or difficulty is sufficient in any particular case is a matter for the tribunal to decide on the facts before it.
- 12 If a medical report expresses an opinion on whether a claimant meets the legal test for disability, that is not conclusive. The issue is a matter of fact for the tribunal to decide (Vicary v British Telecommunications [1999] IRLR 680, see also Abadeh v British Telecommunications Plc [2001] IRLR 23).
- 13 The relevant time to consider whether a person was disabled is the date of the alleged discrimination (McDougall v Richmond Adult Community College [2008] IRLR 227). It is necessary to assess whether, at the time of the act (i.e. on the evidence available at that time) the individual had suffered a substantial effect for a year or more, or – on the evidence at that particular time – was more likely than not to suffer substantial effect(s) for a total of a year or more (Tesco Stores Ltd v Tennant [2020] IRLR 363).

Decision of the Tribunal

- 14 I have considered each of the conditions identified by the Claimant in turn.

Autism

- 15 The Claimant first relies upon the impairment of autism. The evidence in support of the Claimant being autistic is limited to the Claimant's own oral evidence that he recollects being diagnosed when he was at primary school and a subsequent entry on the section of his medical records which records active problems.
- 16 I have had to determine whether it is more likely than not that the Claimant has the impairment of autism. In reaching my decision on this, I have considered both the evidence from the Claimant as to the diagnosis and the description of that impairment as set out in his statement and provided today in answer to Ms Greenley's questions.

17 I am not satisfied that there is sufficient evidence to establish that the Claimant has autism or an impairment of that nature which renders him disabled according to the Equality Act 2010.

18 In reaching this decision I have referred to the following:

17.1 As already noted there is no medical evidence of a diagnosis of autism beyond the single entry in the GP records. Furthermore there is no reference in any of the medical evidence referred to of the Claimant suffering from a type of impairment such as autism, which has been reported at a consultation or treated in any way. In other words, there does not appear to have been any reporting of relevant difficulties to a medical professional arising from such an impairment throughout the years covered by the medical notes to which I have been referred.

17.2 It is for the Claimant to provide evidence to the Tribunal of the activities it is claimed he is less able to carry out because of an impairment. Even if I did accept there was some type of impairment, what is the evidence of the activities upon which there is a substantial and long term adverse effect on the Claimant's ability to carry out?

The Claimant's evidence on this matter is very limited. There are broad references to disliking pubs and clubs and social gatherings and a difficulty with sustaining relationships. I am not satisfied that this information is sufficient. As has been submitted by the Respondent these preferences and issues arise in the general population and I am not clear on the particular link with the impairment identified.

17.3 In addition, when considering the medical evidence provided as to the talking therapies etc, there is no reference to autism but rather mental ill health caused by stressors including being owed money by a family member and having problems at work.

19 I accept that Mr Backer has experienced health problems but I am not satisfied that he has established that he is autistic or that by reason of autism he had an impairment which had a substantial and long term adverse effect on his ability to carry out normal day to day activities from the end of December 2016 onwards.

20 Furthermore, even if it could be argued that Mr Backer was not autistic but had an impairment of that nature, I am still not satisfied that there is sufficient evidence that the impairment had a substantial and long term adverse effect on his ability to carry out normal day to day activities from the end of December 2016 onwards.

Back pain

- 21 Mr Backer has suffered from back pain. Up until 2021 I am satisfied that he suffered from episodes of back pain which were notable but not such that they stopped him from actively pursuing work once he left the army and engaging in work that had some physical aspects to it.
- 22 At the start of 2021, Mr Backer's back pain was present and more significant. This is demonstrated by, for example, his doctor prescribing Tramadol on 23 April 2021.
- 23 Whilst Mr Backer has described in his Impact Statement, the effects of the back pain including extremely interrupted sleep, an inability to wipe after going to the toilet and being unable to bend and kneel, I also note that Mr Backer continued to work full time until late October 2021 at which point, he was signed off for stress at work.
- 24 I must consider whether, as at around April 2021, Mr Backer's back pain amounted to a disability under the Equality Act 2010? I have concluded it did not and in reaching that conclusion, I have referred to the following matters:
- 25 I am not satisfied that at that stage, Mr Backer's back pain was long term.
- 26 I have reminded myself that it is necessary to assess whether at the relevant time, the individual had suffered a substantial effect for a year or more and I am satisfied that Mr Backer had not suffered a substantial effect for a year as at April 2021. I note, for example, the Occupational Health report from 2 July 2020 which recorded that the Claimant was normally fit and well. There was no reference made to chronic back pain and, whilst I have taken into account Mr Backer's evidence on this issue, I have concluded that if he had reported it at that time, it is more likely than not that it would have been recorded by the doctor. Secondly, and consistent with this conclusion, when the back pain was reported in April 2021, it was recorded by the Claimant's GP as having troubled the Claimant for 3 months. In addition, in the Occupational Health report of 27 May 2021, it was recorded in the medical history section that the Claimant had been struggling with the back problem since January 2021.
- 27 The next issue I must consider is whether on the evidence at that particular time, it was more likely than not that the Claimant would suffer substantial effects for a total of a year or more. I am not satisfied on the evidence before me that this is established. I accept that the Claimant was undoubtedly experiencing the effects of back pain but there is very little evidence to support that these effects were substantial or that any substantial effects would last for a total of a year or more. The Occupational Health report identifies that the condition

looks like it is improving and in April 2021, the Claimant was still able to work and was awaiting physiotherapy.

- 28 Mr Backer has provided some evidence to the Tribunal at this hearing and has done his best to assist the Tribunal. However in my judgment, the evidence does not establish that, at the relevant times, his back pain was an impairment which had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. I am not satisfied, on the balance of probabilities, that the back pain experienced by the Claimant in this case was such that the adverse effect on his activities could be said to be 'substantial'.

Employment Judge Harrington

22 July 2023